Some OBSERVATIONS *upon the* Nolle Proſequi *granted in Favour of Mr.* Maſon.

ON St. *Thomas*'s Day, 1738, *John Maſon*, an Houſekeeper and Freeman of the City of *London*, (whoſe Wife carries on a Trade there in right of his Freedom) was elected into the Office of Conſtable for the Ward of *Farringdon within*, but refuſed to ſerve on pretence that he was an Officer of the Exciſe, and, as ſuch, exempt from all Parochial and Ward Offices: Whereupon a Bill of Indictment was preferred againſt him by the City of *London*, and found by the Grand Jury, and when the City hoped to have had an Opportunity of trying the Legality of this pretended Exemption in a Court of Law, Mr. Attorney-General thought proper (notwithſtanding what was urged to the contrary by the City's Council) to ſtop their Proceedings by *Nolle proſequi*.

This Interpoſition of the Attorney-General muſt, in its Conſequences, greatly affect the City of *London*, as an infinite Number of Officers of the various Branches of the Revenue will thereby be encouraged to purchaſe the Privileges of the Freedom, from the Burthens of which they are ſure to be thus protected, Burthens which muſt be borne, and conſequently muſt fall with double Weight upon the Tradeſman and Mechanick, by whoſe Induſtry the Revenue is ſupported, and its Officers maintained.

But there is yet a greater Miſchief ariſes from this Precedent, as it is the Exerciſe of a Power unknown to our ancient Conſtitution, a Power that ſeems inconſiſtent with the Good of the People, as it ſtrips them, when *collectively* injured, of the only means of Redreſs the Law has provided for them.

For theſe Important Reaſons the Court of Aldermen, in Support of the Liberties and Intereſts of their Fellow-Citizens intruſted to their Care, intend to petition His Majeſty that his Attorney-General may be directed to ſuffer freſh Proceſs to iſſue on the Indictment already found; or if that cannot be, to permit the City of *London* to proceed unmoleſted on ſuch others of the like nature as they ſhall be obliged to prefer.

To enable the Court of Aldermen therefore to frame a Petition full of ſuitable Reſpect, yet ſo as to contain the whole Merits of the Caſe, and without admitting any Prerogative in the Crown which it is not by Law inveſted with, it will be proper to conſider

Firſt. The Nature, Antiquity, and Extent of this Great Power claimed by the Attorney-General.

And Secondly. Whether this Power has been properly exerciſed in the preſent Caſe.

By the Bill of Rights 1 *W. & M.* it is declared, "That the pretended Power of "ſuſpending Laws, or the Execution of Laws by Regal Authority without Conſent of "Parliament, is illegal." But what avails this ſolemn Declaration of the Legiſlature, if the Crown, inſtead of ſuſpending the Law, can, in an infinite Number of particular Inſtances, exempt from the Obſervance of it, and by an Interpoſition of this ſort encourage ſo large a Body, as that of Officers of the Revenue, to break it with Impunity.

That the Crown has an undoubted Power of Pardoning before Conviction, as well as after, is admitted; but that the ſtaying a Criminal Proſecution is in nature of a Pardon, and therefore only an Exerciſe of the ſame Prerogative in another Shape, is denied: For ſurely there is a wide Difference between the Pardon of an Offence, and the Screening the Offender from the Law by *Nolle proſequi*; the former preſuppoſes an Offence, and conſequently joins with the Law in condemning it, altho' it ſaves the Criminal from the Penalty incurred: But a *Nolle proſequi* in the firſt Inſtance, not only ſecures againſt the Penalty, but the Cenſure of the Law; not only prevents the Puniſhment which a Pardon may remit, but the Loſs of a Good Name which that can never reſtore; and laſtly, throws upon the Proſecution itſelf the Odium of being ill-grounded or malicious: And yet a Power of this high Nature is entruſted to the Diſcretion of an Attorney-General, whilſt the Law deems the Prerogative of Pardoning ſo ſpecial and inſeparable a Jewel of the Crown, as not to ſuffer it to be communicated even to the higheſt Subject.

The Foundation of this extraordinary Power ſeems to be the Fiction of Law, that in all Criminal Proſecutions, the King, by his Attorney-General, is Plaintiff, and as ſuch has a Right

a Right to ſtay his own Proceedings; but it is plain that the King acts in this Caſe only as Truſtee for his People, and it ſeems inconſiſtent with his Truſt to ſtop, in his Executive Capacity, that Juſtice which, in his Judicial One, he is ſworn not to deny or delay.

This Prerogative is ſaid to have been firſt exerciſed by Mr. Attorney-General *Noy*, in the Time of King *Charles the Firſt*, and then only in the Caſe of *Informations*, where the Neceſſity of ſome ſuch Power ſeemed to give a Sanction to it; for, as the Law ſtood at that time with regard to *Informations*, it was the only Method of preventing the Poor from being oppreſſed and frequently ruined by the Rich, under the ſpecious Forms of a Legal Proceeding.

Before the Statute of the 4th *W. & M. Ch.* 18. it was the conſtant Method of Revenge, upon the ſlighteſt Quarrels, and ſometimes without the leaſt Foundation, to file *Informations* with the Clerk of the Crown-Office; and therefore, 'till the Remedy provided by that Statute, it ſeemed in ſome degree neceſſary, at leaſt reaſonable, that the King ſhould have a Power to interpoſe and prevent his Name from being abuſed, and made an Inſtrument of Oppreſſion and Private Revenge, inſtead of Publick Juſtice and Security; but that Statute having removed the Foundation of the Grievance, by directing that the Clerk of the Crown-Office ſhould not file any *Information* without expreſs Order given in open Court, it ſeems to have taken away all Pretence for the Crown's Interpoſition by *Nolle proſequi*, except where the King is in Fact, as well as Nominally, Proſecutor.

The Power of entering *Nolle proſequi's* to *Indictments* is certainly of a later Date, and ſeems to have been a Prerogative grafted upon the former; but altho' grounded upon the ſame Fiction of Law, it cannot be pretended to have ever had the ſame *Neceſſity* for its Juſtification, no Man being obliged to plead to an *Indictment* 'till a *Grand-Jury* think there are ſufficient Reaſons to put him upon his Tryal; and the Lord Chief-Juſtice *Holt* tells us, he had known it thought very hard that the Attorney-General ſhould enter *Nolle proſequi's* to *Indictments*; and that it begun to be practiſed the latter end of King *Charles the Second's* Reign.

Caſe of Goddard *and* Smith 6 Mod. 262.

But ſurely we may hope, from His Majeſty's known Regard for the Rights of his People, that no Power that takes its Date from thoſe violent and arbitrary Times, ſhall now be claimed and extended to affect the City of *London* in her moſt valuable Rights and Privileges.

True it is, that notwithſtanding this Cenſure of my Lord *Holt*, the power of *Nolle proſequi's* has ever ſince continued to be exerciſed even upon *Indictments*; but the prudent and moderate Uſe of it of late Years may reaſonably be preſumed to have prevented it from being conteſted, or called into Queſtion.

And therefore ſuppoſing, but not admitting, ſuch a Power in the Crown, it remains to be conſider'd, whether this Power has been properly exerciſed in the preſent Caſe.

This extraordinary Power (if any) muſt be admitted to be a Truſt repoſed in the Crown for the Benefit of the People, and deſign'd to prevent their being either harraſs'd, under Colour of Juſtice, where an Indictment is found contrary to the ſettled Rules and Determinations of Law, or puniſh'd by the Letter of the Law, where they are clearly out of the Meaning and Intention of it.

Theſe are the only Caſes in which this Power (ſuppoſing it to be legal) can with Juſtice, or ought to be exerciſed; and in the former, the Law ought to be ſo clear as to make the Proſecution evidently malicious and oppreſſive; in the other, the Circumſtance to be allowed as an Exception to the Law ought to be ſuch as may reaſonably be ſuppoſed to have eſcaped the Notice of the Legiſlature, and ſuch as they would have provided for, could they poſſibly have foreſeen it.

Let us therefore examine Mr. *Maſon's* Title to the Benefit of this equitable Power under both theſe Heads.

It was urged for the Defendant, that the Indictment was found contrary to Law; for that the King, by his Patent to the Commiſſioners of the Exciſe, had exempted them, and all who ſhould be appointed or deputed by their Warrant, from ſerving of Offices; that the Defendant was a Clerk in the Permit-Office belonging to the Exciſe, ſo appointed by Warrant from the Commiſſioners; and that the Court of Exchequer had confirmed the Patent, by granting the Defendant a Writ of Privilege agreeable to the Intention and Effect of it.

But the Defendant's Council ought to have gone further, and ſhewn that ſuch Patent or Charter of Exemption had ever, upon Debate, been ſolemnly adjudged to be legal by the Judges, or that his Writ of Privilege had been granted him by the Barons in a judicial Way.

But that he could not do: For as to the Charter, no expreſs Reſolution of the Judges was or can be produced in its Favour; and with regard to the Legality of it (without mentioning the many Reaſons and Authorities urged againſt it by the City's Council) it will be ſufficient here to obſerve, that the City's Right of Election is by *Cuſtom* confirmed by Parliament; that the Office of Conſtable is one of the moſt ancient Offices known to the

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Law, and abſolutely neceſſary for the Peace and Government of the Society; and laſtly, that the Exemption in the Patent is granted, not to any Body politick, or to particular Perſons only, but to an indefinite Number of People no ways incorporated, and moſt of them not ſo much as in *Eſſe* at the Time of the Grant; and then let us ſee how theſe Facts tally with the following general and indiſputable Rules of Law, *viz.* That Charters of Exemption are never favoured by the Judges; that every Grant from the King has this Condition either expreſly or tacitly annex'd to it, *Ita quod Patria per Donationem illam magis ſolito non oneretur ſeu gravetur*; that the King may diſpenſe with what concerns his own Benefit only, but not with what concerns the Benefit of the Subject; that he can only exempt from ſuch Offices as are filled by his Appointment or Authority, and not from ſuch as are in the Election or Nomination of the Subject; and laſtly, that an Exemption is a perſonal Franchiſe, and muſt veſt in ſome Body immediately, and therefore cannot by the King be limited to follow an Office, or be granted *in futuro*.

Theſe Facts and theſe Rules compared together, if they do not prove the Charter in Queſtion to be illegal, do at leaſt ſerve to make the Legality of it doubtful, and conſequently juſtify the City in conteſting it, and deſiring to have the Opinion of a Court of Law upon it.

The Writ of Privilege cannot be deemed ſuch a legal Determination in the Caſe as the Importance of it requires, ſince it is well known that ſuch Writs iſſue out of the Exchequer upon the bare *fiat* of a ſingle Baron granted of courſe at his Chambers, and in which he ſeems to act rather miniſterially as an Officer of the Revenue, than judicially as an Interpreter of the Law.

If the Defendant is not entitled to an Exemption by his Patent, neither is he, or does he claim to be ſo, by *Statute or Preſcription*; the Legiſlature have not thought fit expreſly to exempt him, and the Exciſe-Office itſelf is of too modern an Inſtitution for its Officers to *preſcribe* for any Privileges whatſoever.

Therefore laying the Charter, Writ of Privilege, Statutes, and Preſcription, that is, all *legal* Right out of the Caſe, let us conſider the Circumſtances alledged to entitle the Defendant in Point of *Equity* to the Attorney-General's Interpoſition.

His merely being an Officer of the Revenue (as it is a Title he has in common with the moſt numerous Body in the Kingdom) is not ſuch a Circumſtance as can with any Colour of Reaſon be ſuppoſed to have eſcaped the Legiſlature, eſpecially ſeeing the great Variety of Acts relating to the Revenue, and how frequently its Officers have come under the Conſideration of Parliament; and therefore the Silence of the Law, in a Matter of this Conſequence to thoſe Officers, makes it highly reaſonable to infer, the Legiſlature did not think it neceſſary, or proper to exempt them; and if *they* cannot be preſumed to have intended them this Privilege, it muſt appear extraordinary that an Attorney-General ſhould have Power to grant them the Benefit of it.

The Argument drawn from the Inconſiſtency of the Office of Conſtable with the Defendant's Employment under the Crown, muſt likewiſe fall to the Ground, as it is notorious the former of theſe may be and moſt frequently is exerciſed by Deputy; but if it could not; the Hardſhip and Inconvenience of a double Duty are no more than every other Subject muſt ſubmit to, whoſe Trade is his Employment, and whoſe Induſtry is perhaps of as much advantage to the Publick as the Service of an Exciſeman; and it would be extremely hard upon the Trader, if an Office of Profit in the Revenue, voluntarily enter'd into, ſhould exempt others from an Office of Burthen, which *he* is compellable to ſerve when called upon.

Upon the Whole, as the *Nolle proſequi* in the preſent Inſtance appears to have been granted without ſufficient Reaſons, if not contrary to Law, the City of *London* may juſtly hope, that his Majeſty, upon a proper Repreſentation of the Caſe, will direct his Attorney-General not to preclude them for the future from the Benefit and Protection of the Law; but to leave them at Liberty, by ſuch legal Ways and Means as they ſhall be adviſed, to vindicate their Right of Election, and bring the Violators of it to condign Puniſhment.

Some OBSERVATIONS upon the *Nolle prosequi* granted in Favour of Mr. *Mason*.

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